



The Canadian Corruption of Foreign Public Officials Act

Overview

Canada passed the **Canadian Corruption of Foreign Public Officials Act** (the "CFPOA") in 1999. Over the past several years Canada has seen increased enforcement of the CFPOA by the Royal Canadian Mounted Police (the "RCMP") and Crown prosecutors.

Offenses

Under subsection 3(1) of the CFPOA, every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official: (i) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (ii) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Subsection 4(1) of the CFPOA creates a "books and records" offence. Under subsection 4(1), every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery: (i) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards; (ii) makes transactions that are not recorded in those books and records or that are inadequately identified in them; (iii) records non-existent expenditures in those books and records; (iv) enters liabilities with incorrect identification of their object in those books and records; (e) knowingly uses false documents; or (v) intentionally destroys accounting books and records earlier than permitted by law. While this offence is relatively new, it is important to note that U.S. authorities rely heavily on the "books and records" provisions of the **Foreign Corrupt Practices Act** (U.S.) (the "FCPA") to prosecute corruption and bribery. Canadian authorities may follow suit and attempt vigorous enforcement of this offence. The definition of "business" under the CFPOA has recently been broadened to include any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere, whether or not for profit.

Comparison

Since the Canadian and American international anti-bribery offences are similar, compliance is less complex for corporations that fall within both jurisdictions. Both Acts forbid transferring or offering to transfer any type of benefit for the purpose of influencing a foreign official to misuse his or her power or

influence. Neither act requires that the conveyance be direct; bribes given through an agent or received by a party other than an official are still prohibited if the ultimate goal is to influence an official by conferring a benefit. Both Acts require that the purpose of the bribery be to obtain or retain a business advantage but neither requires that the bribe be successful. Finally, both Acts incorporate very similar definitions of "foreign public official", which includes members of government bodies and public international organizations.

Criminal Code Offences

It should be noted that companies charged under the CFPOA may also be charged under the *Canadian Criminal Code* with fraud, secret commissions and conspiracy. Provisions of the Criminal Code also prohibit the laundering or possession of the proceeds of other criminal acts. There is also a risk of sanctions by provincial securities regulators.

Jurisdiction

The CFPOA provides for nationality jurisdiction. Nationality jurisdiction is established by deeming actions taken outside of Canada to have occurred inside Canada where: (i) the action was taken by a Canadian citizen, a Canadian permanent resident or an organization incorporated or organized under the laws of Canada; and (ii) the action constitutes an offence under the CFPOA (or where the actions constitute an attempt, conspiracy, being an accessory after the fact, counselling in relation to, or other offences related to the violation of the CFPOA).

Exceptions

The CFPOA and the FCPA currently offer the same three exceptions with slight variances. However, it is important to note that a recent amendment to the CFPOA eliminates the third exception (facilitation payments). The coming into force of this amendment was suspended until a future date to be determined by cabinet. The first exception allows payments that are lawful under the laws and regulations of the foreign nation where they were received. The second exception allows reasonable expenditures made in order to develop a business relationship. This may include payments made for the purpose of demonstrating, promoting or explaining products or executing or performing obligations of a contract formed with a foreign government, but may not include entertainment or other, softer, expenses. The third exception exempts facilitation payments from the bribery prohibitions. As mentioned above, a recent amendment to the CFPOA eliminates this exception. However, the coming into force of this amendment was delayed to allow Canadians and Canadian entities adequate time to adapt their business practices. As a result, it is very important to be aware of this amendment and adapt business practices accordingly, prior to the coming into force date. The CFPOA does not provide any due diligence defence. There has been no official Canadian guidance indicating how or whether the RCMP will take into account the adequacy of a company's anti-corruption program in determining how to proceed with enforcement actions.

Penalties

Unlike the FCPA which can be enforced through civil or criminal sanctions, the CFPOA can only be enforced through criminal prosecution. In addition, only an officer of the RCMP or any person designed as a peace officer under the Royal Canadian Mounted Police Act can lay charges. Conviction for a CFPOA violation is an indictable offence and can result in imprisonment for up to fourteen years. There is no

legal limit to fines that can be imposed; the quantum is left to the discretion of the court. There is also no Canadian statute of limitations for indictable offences. It is important to note that in Canada criminal corporate liability travels further down the chain of command than directors and management; liability extends to the acts of "senior officers", even though they may not be acting as a "directing mind" of the corporation. Under the Canadian Criminal Code a "senior officer" is defined as a "a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer." There are extensive resources available to entities requiring additional information with respect to this legislation. This summary has been provided for information purposes only and should not be relied upon as legal advice. Consult with legal advisors to obtain current guidance on questions as they arise.

Source: Norton Rose Fulbright Canada

Additional References: <http://laws-lois.justice.gc.ca/eng/acts/c-45.2/index.html>

<http://www.cba.org/cba/advocacy/anticorruption/default.aspx>

http://transparency.ca/9-Files/Older/2012-New/2012-TI-Canada_Anti-Corruption_Checklist_2012R1.pdf